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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED AMERICAN TELECASTERS, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether an administrative agency is required to follow its own precedent in dealing with applicants who come before it seeking licenses.

Whether an agency, by not disclosing the full basis for its decision, deprives an applicant of legal due process rights.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed, except those named in the caption, hereto, are:

KIST Corp.
Bethel Broadcasting, Inc.
Sunland Communications Company
Riverside Family Television

United American Telecasters, Inc., the petitioner herein, has no parent company, no subsidiaries and is not the affiliate of any corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit which appears as appendix C is unreported. The opinion of the Federal Communications Commission which appears at appendix D is reported at 102 FCC 2d 288 (1985). The opinion of the Commission's Review Board which appears at appendix E is reported at 99 FCC 2d 173 (1984). The Initial Decision of Administrative Law Judge Joseph Chachkin which appears at appendix F is reported at 99 FCC 2d 201 (1983).

JURISDICTIONAL STATEMENT

Petitioner, United American Telecasters, Inc. (United), hereby petitions for a writ of certiorari to review the Memorandum of the United States Court of Appeals for

the District of Columbia Circuit, dated October 15, 1986 which affirmed a holding by the Federal Communications Commission that petitioner was not financially qualified to be a Commission licensee. On December 1, 1986, petitioner timely filed a petition for rehearing by the Court of Appeals *en banc*. By order dated December 29, 1986, petitioner's request for rehearing *en banc* was denied.

JURISDICTION

Jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1254.

STATUTE INVOLVED

Communications Act of 1934, As Amended

Construction Permits

Section 319. (a) Requirements. No license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant.

47 United States Code, Section 319(a).

STATEMENT OF THE CASE

The United States Court of Appeals for the District of Columbia affirmed a *Memorandum Opinion and Order*, 102 FCC 2d 288 (1985), by which the Federal Communications Commission (Commission) granted an application of the Sunland Communications Company (Sunland) for a new commercial television station at Riverside, California and denied the competing applications, including that of petitioner, United.

In denying the application of United, the Commission affirmed the holding of its Review Board that United was not financially qualified because the bank on which United was relying for the funds necessary to operate and construct its proposed station had a legal loan limit which was less than the loan contemplated and United had not demonstrated the willingness of other banks, whose participation would be necessary if the loan was to be made, to participate in the loan. *Decision*, 99 FCC 173 (1983). This *Decision*, by the Review Board, affirmed a holding in the *Initial Decision* in this case that United was not financially qualified. 99 FCC 2d 201 (1983).

Subsequent to the release of the *Initial Decision*, and while this case was still before the Commission's Review Board, the bank on which United had relied went out of existence. United thereafter amended its application to reflect a new source of funding and to provide other evidence demonstrating its financial qualifications. United's new financial showing was not considered by the Review Board on the ground that it would be disruptive of the administrative process to accord an applicant a post-hearing opportunity to establish its financial qualifications.

Under comparative considerations, the *Initial Decision* granted the application of Sunland. The Review Board reversed this determination and preferred the applica-

tion of KIST Corp. The Commission reversed, restoring the preference for Sunland.

United here seeks review of the Review Board's holding as affirmed below that it could not be comparatively considered because it is not financially qualified to be a Commission licensee. If United, whose principals are almost entirely persons of Asian heritage and all of whom reside within the area which would be served by the station, had been comparatively considered, it would have been entitled to a comparative preference over the other applicants and would have been awarded the right to construct its new television station at Riverside, California.

Jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to review cases from the Federal Communications Commission is provided by Title 28 United States Code, Section 2342 and Title 47 United States Code, Section 402(b).

REASONS FOR ALLOWANCE OF WRIT

I. The decision of the agency is so contrary to its own precedent as to be arbitrary and capricious.

The Federal Communications Commission is authorized by the *Communications Act of 1934, as amended* to award construction permits to applicants for new broadcast stations. Section 319(a) of the Act provides that an application for a construction permit "shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character and the *financial*, technical, and other ability of the applicant to construct and operate the station. . ." (emphasis supplied). The instant case involves mutually exclusive applications to construct and operate a new television station at Riverside, California. One of these applicants, petitioner United American Telecasters, Inc. (United), was found financially unqualified to construct and operate its proposed station. For this reason, its application was not considered com-

paratively and United did not receive the construction permit at issue.

This case presents the Supreme Court of the United States with an opportunity to make clear that regulatory agencies, if their actions are to stand, must act in a consistent fashion. Indeed, as the Court of Appeals stated in *NLRB* v. *Mall Tool Co.*, 119 F.2d 700, 792 (7th Cir., 1941), the need for "[c]onsistency in administrative rulings is essential" and "to adopt different standards for similar situations is to act arbitrarily." See also *Crosthwait* v. *FCC*, 189 U.S. App. D.C. 392, 398, 584 F.2d 550, 556 (D.C. Cir. 1978) wherein the court reminded the Federal Communicttions Commission that agency action cannot stand when it is "so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion." (Footnote deleted).

In the instant case, the Commission has acted in an arbitrary and capricious manner, inconsistent with its past precedents, in two separate and distinct rulings with regard to United's financial qualifications. First, the Commission held that United was not financially qualified because it had not demonstrated at hearing that other banks would participate in its bank loan and, second, it refused to consider amendments to United's application reflecting new sources of funding proffered after the bank on which United was relying at hearing went out of existence. As will be shown, the Commission had never before required that an applicant demonstrate the willingness of other banks to participate in a loan nor has it generally refused to accept amendments to meet a financial issue where the need to amend is the result of an action beyond the control of the applicant and the amendment is otherwise unobjectionable.

In demonstrating its financial qualifications, an applicant is only required by the Commission to show that it has a "reasonable assurance" that if its application is granted it will have the funds necessary to effectuate its

proposal. Moreover, the Commission may not thereafter elevate this "reasonable assurane" standard to something more stringent. *See Multi-State Communications*, 192 U.S. App. D.C. 1, 590 F.2d 1117 (D.C. Cir. 1978), and *Las Vegas Valley Broadcasting Co.*, 191 U.S. App. D.C. 71, 589 F.2d 594 (D.C. Cir. 1978). Here, United not only obtained a bank loan letter that indicated that its loan would be syndicated, but also proffered testimony at hearing from bank officials that they were aware that the loan would require the participation of other banks. In concluding that this showing was inadequate, the Review Board explicitly recognized the unprecedented nature of its holding, stating that "the precedent relative to syndication loans may be written somewhat unevenly. *See Washington Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1362-1364 (Rev. Bd. 1983). . .", 99 FCC 2d at 178-179. The phrase "written somewhat unevenly" is a mere euphemism for "inconsistently". In the *Washington Christian* case, which the Board cites, the Board held that it was "unduly harsh" to disqualify an applicant because its bank loan letter was for an amount greater than the bank's lending limit. 94 FCC 2d at 1364. Significantly, the Board's characterization of the Commission's precedent as uneven was not disputed by the Commission when it affirmed the Board's decision. It is patently unfair and arbitrary to find an applicant disqualified on the basis of a standard enunciated in precedent which the Commission itself admits is "written somewhat unevenly". Such arbitrary treatment of an applicant is precisely what the Court of Appeals warned the Commission about in the *Crosthwait* case and is patently contrary to the public interest because it destroys the public's faith in the administrative process.

Even during the appeal in this case, the Commission has been unable to cite any precedent under the reasonable assurance standard that would require an applicant to supply evidence that other banks would be willing to

participate in its principal bank's loan. The case most on point is *CBS, Inc.*, 49 FCC 2d 1214, 1229 (1973), where the Review Board held that where a contemplated bank loan would exceed a bank's statutory limit, an applicant must show "*either* that the . . . [bank] . . . contemplates and is willing to arrange to have other banks share in the loan, *or* that other banks would be willing to participate in extending funds to the full extent necessary . . ." (emphasis supplied). United met the first part of this test, *i.e.*, it showed that its bank was willing to syndicate the loan, but still it was found unqualified.

On appeal, the Court of Appeals found that "[t]he agency decisionmakers [sic] appropriately required evidence that the proposed lender be both willing and able to furnish the necessary funds." United submits that this test was met within the reasonable assurance context. United's bank was willing to lend United the necessary funds and it recognized its need to syndicate the loan to meet its commitment. This is all that agency decision makers at the Commission have ever required of applicants. See *CBS Inc.*

It must be remembered that at the time an application is pending before the Commission, an applicant is only seeking a reasonable assurance from a lender that if its application is granted at some time in the future, it will have the funds necessary to finance its proposal. At the point in time when applicants are negotiating with banks for such assurances nothing is definite. To require banks and/or applicants to seek agreements from other banks for a loan which may never be made is unreasonable on its face and goes beyond the reasonable assurance which the Commission says it requires.

Finally, the Commission's disqualification of United is contrary to the Commission's expressed intention to eliminate rules which create economic barriers to applicants seeking broadcast licenses. Under today's policies, for example, applicants need only certify to their financial

qualifications and they are deemed financially qualified. See *Revision of Form 301*, 50 RR 2d 381, 382 (1981). In revising form 301, the Commission noted that where financial problems exist, "the vast majority of applicants have been able to amend their applications to remedy any perceived deficiency" (*Id.*). In short, the Commission itself has apparently perceived that stringent scrutiny of applicants' financing is superfluous in determining whether applicants will be able to construct and to operate as proposed.[1]

Regardless of whether United was found financially qualified at hearing, once the bank on which it was relying ceased to exist, United's amended financial showing should have been considered. Both the Review Board and the Court of Appeals held that to consider United's new financial showing would have disrupted and retarded the orderly conduct of the Commission's business. While it is true that an amendment may not be accepted if the proceeding would be disrupted by requiring further hearings, the Commission, in the past, has found applicants financially qualified based on amendments submitted after the close of the hearing, without requiring further hearing. In *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 462 (1982), for example, the Commission received a financial amendment submitted after the hearing and found the applicant financially qualified, even though its own Broadcast Bureau argued that acceptance of the amendment would require further hearings which would disrupt the proceeding. Such treatment contrasts sharply with that accorded United, whose amendments were ignored.

Here, aside from the claim that acceptance of its amendment would be disruptive, United's compliance

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[1] Petitioner does not intend by this discussion to suggest that the Commission has abandoned its financial requirements. It does reserve the right to require applicants to produce additional financial information where warranted.

with the Commission requirements for acceptance of amendments has not been questioned and there was no reason to deny United's amendments. See the standards set forth in *Erwin O'Connor Broadcasting*, 22 FCC 2d 140 (Rev. Bd. 1970).

The Court of Appeals also found that "the Review Board acted within the bounds of its discretion in refusing United's tender of a substitute lender." To the extent, however, that the Board may exercise discretion in such matters, where there is clear precedent on a matter, that precedent should not be ignored without explanation. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962). Moreover, here the Board's "discretion" may mask an *ad hoc* approach to decision making rather than the reasoned decision making which is required of all agency decision makers.

As a final matter, it is simply incredible to believe that petitioner could not raise the funds necessary to construct and operate its station given that the station's service area includes the massive Los Angeles market. Given this service area, the denial of United's application on the basis of a highly questionable holding that it did not establish that participating banks would join in the financing of its loan is a clear injustice which requires correcting.

II. This agency, by not disclosing the full basis for its decision, has deprived petitioner of its appeal rights.

There is now an additional reason why this petition should be granted. In a case just recently decided, *Las Americas Communications, Inc.*, released March 16, 1987 (FCC 87R-8), the Review Board revealed, for the first time, that it had found United "financially disqualified in part because of apparent collusion in fashioning a defective bank loan commitment." In fact, nowhere in the Board's Decision in the instant case was United even accused of engaging in collusion with the bank. At 99

FCC 2d 183, the page of its Decision cited by the Board in support of this contention, the Board did find that United's bank letter "may have been more of an accommodation. . . ." A bank letter received as an "accommodation", however, is very different than one obtained as a result of collusion. Collusion is defined as "an agreement between two or more persons to defraud. . . ." *Black's Law Dictionary*, 4th Ed. Rev. An accommodation, on the other hand, does not involve fraud.

This recent statement by the Review Board, some two and one-half years after its Decision, raises questions as to why United was found disqualified. Although the Board qualifies its statement by saying that United's disqualification was "in part" because of collusion, there is no way of knowing how big a part this previously undisclosed factor may have had in the Board's Decision. To the extent that the Board based its Decision on the undisclosed belief that United was guilty of fraud in obtaining its bank letter, United has been deprived of its right to challenge the basis of that holding both with the Commission on Application for Review and with the Court of Appeals on Appeal. Thus, United has been denied its right to legal due process in this proceeding.

If United had known that the Board's Decision was based on a holding that it had engaged in collusion, on appeal it could have pointed out that it had no notice of the allegation and had never been given an opportunity to present evidence to rebut the charge. Under normal Commission procedure, when allegations are made against an applicant, an appropriate issue is added to the proceeding and the applicant is given the right to defend itself. Here, the Board apparently reached its Decision without following normal procedures and apparently found that United engaged in collusion without United even knowing it was accused of such conduct.

The Board's revelation is also significant in this case because the Court of Appeals held that the Board had

acted within its discretion in rejecting United's amendments filed after conclusion of the hearing. The Board's rejection was based on its holding that United had not demonstrated its financial qualifications at hearing. If the reason for the Board's action in holding United unqualified was not disclosed in its Decision, the Court of Appeals could not have formed an intelligent opinion as to whether the Board's action rejecting United's amendments was within the range of its discretion. Thus, the Board's revelation in *Las Americas* not only casts doubt on the Board's own Decision but also undermines the Court's affirmance thereof.

CONCLUSION

This petition should be granted on two counts. The Board's Decision finding United financially unqualified was so contrary to precedent as to be arbitrary and capricious. Also, the Board's Decision did not reveal the full basis for its Decision, thereby depriving petitioner of its legal due process rights.

Respectfully submitted,

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